

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
TracFone Wireless, Inc.)	
)	
Petition for Designation as an)	
Eligible Telecommunications Carrier)	
In the State of New York)	
)	
Petition for Forebearance)	

Comments of TCA, Inc. – Telcom Consulting Associates

I. Introduction

TCA, Inc. – Telcom Consulting Associates (TCA) files these comments in response to the Commission’s request.¹ At issue are two petitions filed by TracFone Wireless, Inc. (TracFone) – one for designation as an Eligible Telecommunications Carrier (ETC) throughout the state of New York² and the other requesting the Commission to forebear Section 214(e)(1)(a) of the

¹ Public Notice, *Parties are Invited to Comment on TracFone Wireless’ Petition for Designation as an Eligible Telecommunications Carrier in the State of New York and Petition for Forebearance from Application of Section 214*, CC Docket 96-45, DA 04-1822, rel. June 24, 2004.

² In the Matter of Federal-State Joint Board on Universal Service, TracFone Wireless, Inc., *Petition for Designation as an Eligible Telecommunications Carrier in the State of New York*, CC Docket 96-45, (filed June 7, 2004) (TracFone Petition for ETC Designation). TCA notes that on July 21, TracFone filed for ETC status in the states of Florida and Virginia. See In the Matter of Federal-State Joint Board on Universal Service, TracFone Wireless, Inc., *Petition for Designation as an Eligible Telecommunications Carrier in the State of Florida*, CC Docket 96-45, (filed July 21, 2004) and In the Matter of Federal-State Joint Board on Universal Service, TracFone Wireless, Inc., *Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket 96-45, (filed July 21, 2004).

Telecommunications Act of 1996 (the Act).³ TCA strongly urges the Commission to swiftly deny both petitions filed by TracFone.

TCA is a management consulting firm providing financial, regulatory, management and marketing services for over eighty small, rural local exchange carriers (“LECs”) throughout the United States. TCA’s clients, including LECs in the state of New York, receive support from federal universal service support mechanisms, based on specific rules and regulations and will be directly impacted by the decisions made by this Commission. These comments address the concerns of TCA’s clients.

II. The FCC’s original decision to deny ETC status to resellers is correct and should stand.

TracFone, in part, bases its Petition for Forebearance on the assertion that the FCC’s original “1997 premise that all resold services receive universal service support is not correct.”⁴ In its 1997 Report and Order, the FCC stated, “if pure resellers could be designated eligible carriers and were entitled to receive support for providing resold services, they in essence, would receive a double recovery of universal service support...”⁵ In its Petition for Forebearance, TracFone states that it purchases services from “more than thirty underlying CMRS providers.”⁶ It continues by stating “[m]ost of TracFone’s vendors are not ETCs...”⁷ However, TracFone never provides a list of its vendors in order for the FCC to ascertain the accuracy of this statement.

TracFone does, within its Petition for ETC Designation, list its vendors in the state of New York. From this list, the FCC can easily determine that many of TracFone’s vendors are indeed ETCs or currently seeking ETC status. TracFone lists, as its vendors in New York, wireless carriers AT&T Wireless, Cingular Wireless, Dobson Cellular, Rural Cellular Corporation and Verizon

³ In the Matter of Federal-State Joint Board on Universal Service, *Petition for Forebearance*, CC Docket No. 96-45, (filed June 8, 2004) (TracFone Petition for Forebearance).

⁴ TracFone Petition for Forebearance, p. 2.

⁵ In the Matter of Federal-State Joint Board on Universal Service, *Report and Order*, FCC 97-157, CC Docket No. 96-45, para. 179 (rel. May 8, 1997) (1997 Report and Order)

⁶ TracFone Petition for Forebearance, p. 9.

⁷ *Ibid.*, (emphasis added).

Wireless.⁸ AT&T Wireless has active ETC applications for three states – Alabama, Mississippi and Washington.⁹ Rural Cellular Corporation has been granted ETC status in five states – Alabama, Maine, Mississippi, Vermont and Washington – and has active ETC applications for five states – Kansas, Minnesota, New Hampshire, Oregon and South Dakota.¹⁰ Dobson Cellular has active ETC applications for nine states, including New York.¹¹ The other states where Dobson Cellular is currently applying for ETC status are Alaska, Kentucky, Michigan, Minnesota, Oklahoma, Pennsylvania, Texas and Wisconsin.¹²

In its two additional filed Petitions for ETC Designation,¹³ TracFone lists additional vendors including Alltel, U.S. Cellular and Virginia Cellular. All three of these TracFone vendors are currently receiving high-cost support and actively seeking further ETC designations. Alltel has been granted ETC status in five states – Arkansas, Michigan, Mississippi, Wisconsin and West Virginia.¹⁴ Alltel is currently seeking ETC designation in eight states, including Alabama, Arizona, Georgia, Kansas, Louisiana, New Mexico, North Carolina, and South Carolina.¹⁵ U.S. Cellular has attained ETC status in three states – Iowa, Washington and Wisconsin – and is seeking ETC designation in four states – Maine, New Hampshire, Oklahoma and Oregon.¹⁶ Virginia Cellular has been granted ETC status in Virginia.¹⁷

⁸ TracFone Petition for ETC Designation, p. 2.

⁹ USAC Universal Service Fund Projection, HC01 Report, 3rd quarter, 2004, found at <http://www.universalservice.org/overview/filings/2004/Q3/>. TCA notes that if the currently proposed merger between Cingular Wireless and AT&T Wireless is approved, then Cingular Wireless could possibly be considered an ETC.

¹⁰ Ibid.

¹¹ See In the Matter of Federal-State Joint Board on Universal Service, Dobson Cellular Systems, Inc., American Cellular Corporation, Joint Petition for Designation as Eligible Telecommunications Carriers in the State of New York, *Joint Petition for Designation as Eligible Telecommunications Carriers in the State of New York (No Rural Redefinition Requested)*, CC Docket No. 96-45, filed May 3, 2004; See also In the Matter of Federal-State Joint Board on Universal Service, Dobson Cellular Systems, Inc., American Cellular Corporation, Joint Petition for Designation as Eligible Telecommunications Carriers in the State of New York, *Joint Petition for Designation as Eligible Telecommunications Carriers in the State of New York (Rural Redefinition Requested)*, CC Docket No. 96-45, filed May 10, 2004.

¹² USAC Universal Service Fund Projection, HC01 Report, 3rd quarter, 2004, found at <http://www.universalservice.org/overview/filings/2004/Q3/>.

¹³ TCA notes that the FCC is not seeking comment on these Petitions. See Footnote 2.

¹⁴ USAC Universal Service Fund Projection, HC01 Report, 3rd quarter, 2004, found at <http://www.universalservice.org/overview/filings/2004/Q3/>.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

TracFone states that resell arrangements with its underlying vendors allow it “to offer wireless telecommunications service in virtually any U.S. market... including offshore markets such as Alaska...”¹⁸ Therefore, it would seem to be reasonable that as admitted TracFone vendors currently either have or are seeking ETC status in twenty-eight individual states, including the state that TracFone is concurrently applying for ETC status, the FCC original premise made in 1997 would continue to hold true today. If the FCC were to grant TracFone’s petitions, there is a very real possibility that TracFone would receive double recovery of universal service support.

TracFone, in its Petition for Forebearance, implies that, even if a TracFone vendor is also an ETC and receiving universal service support, the wholesale rates charged to TracFone “are not subsidized by Universal Service support”¹⁹ and therefore the FCC’s argument in 1997 does not stand. TracFone’s own arguments actually prove why the FCC’s original premise continues to be germane. TracFone argues that “[t]hose few of TracFone’s vendors which are ETCs are not subject to rate regulation of any type and those carriers are not *required* to reflect their receipt of universal service support in the wholesale rates which they charge TracFone...”²⁰ High-cost support, the type of support that both TracFone and its vendors want or are receiving, is to be used “only for the *provision, maintenance, and upgrading of facilities* and services for which the support is intended.”²¹ As TracFone purchases services provisioned over facilities supported, in part, by federal high-cost funds, it cannot guarantee, nor can any of its ETC vendors, that the wholesale rates are *not* subsidized by universal service support. As “TracFone’s vendors which are ETCs *are not subject to rate regulation of any type...*” there is absolutely no way that the FCC, nor any regulatory authority, can ever be certain that rates negotiated by TracFone are not subsidized by universal service support.

Granting TracFone’s Petition for Forebearance would only allow TracFone and other resellers with no facilities of their own double recovery of federal universal service funds. Not only would such double recovery explode the federal high-cost fund at a time when the FCC is

¹⁸ TracFone Petition for Forebearance, p. 3.

¹⁹ TracFone Petition for Forebearance, p. 9.

²⁰ Ibid., (emphasis added).

²¹ 47 U.S.C. §254(e) (emphasis added).

seeking ways to limit such growth,²² but it “would be inconsistent with the principle of competitive neutrality because it would provide inefficient economic signals to resellers.”²³ The FCC was correct in 1997, and continues to be correct today, not to forebear Section 214 of the Act. TracFone’s Petition for Forebearance should be summarily and wholly denied.

III. TracFone’s Petition for ETC Designation is fatally deficient.

Even if the FCC grants TracFone’s Petition for Forebearance, TracFone’s Petition for ETC Designation is fatally flawed and must be denied. Without comprehensive changes to its business model, TracFone can never certify that “all high-cost support provided to TracFone will be used only for the provision, maintenance and upgrading of facilities and services for which the support is intended...”²⁴ Without changes to its business model, TracFone cannot offer to its customers Lifeline and Link-Up, as it states it will²⁵, and, as an ETC, it must. Finally, even though it is requesting ETC status for eight federally-recognized tribal land areas, TracFone’s application is incomplete as to additional requirements when seeking ETC status on tribal lands. On its face, TracFone’s Petition for ETC Designation must be denied.

A. TracFone cannot currently certify that its use of high-cost support will be in compliance with Section 254(e) of the Act.

As TracFone states, its entire business model is predicated on selling consumers prepaid wireless services with no contracts, no credit checks and *no bills*.²⁶ Consumers need not ever contact TracFone in order to use its service. TracFone sells its services at over 60,000 retailers nationwide.²⁷ Theoretically, a customer could purchase a TracFone in Manhattan and use it in Taconic or a customer could purchase a TracFone in Taconic and use it in Los Angeles.

TracFone’s business model offers convenience to consumers, unfortunately, it is this very convenience that dooms its ETC application. High-cost support is provided to ETCs in order to

²² In the Matter of Federal-State Joint Board on Universal Service, *Notice of Proposed Rulemaking*, FCC 04-127, CC Docket No. 96-45 (rel. June 8, 2004).

²³ 1997 Report and Order, para. 179.

²⁴ TracFone Petition for ETC Designation, Attachment 3, Certification for High Cost Loop Support.

²⁵ TracFone Petition for ETC Designation, p. 2.

²⁶ See, in general, TracFone Petition for ETC Designation. See also, TracFone Petition for Forebearance, p. 3 (“In fact, there are no customer bills.”)

²⁷ See <http://www.tracfone.com/howitworks.jsp?nextPage=howitworks.jsp&task=howitworks>.

develop and maintain a communications network in high-cost areas. Such support is portable; Meaning that a competitive ETC would receive the same amount of high-cost support, per line as does the incumbent carrier in the high-cost area. Due to the nature of mobile service, the FCC needed a way to determine how many lines the wireless carrier was serving in a high-cost area. The wireless customer's billing address was chosen as a reasonable surrogate to make this determination. However, recognizing the potential for arbitrage, the FCC warned all ETCs that if a carrier were to "misuse a customer's billing address by identifying a customer in a high-cost zone when service is primarily taken in a low-cost zone for the purpose of receiving a higher level of per-line support, we will take appropriate enforcement action."²⁸

Through the information it has presented to the FCC, TracFone currently cannot adequately identify even one customer in a high-cost area. Further, TracFone presents absolutely no process by which it would identify customers in high-cost areas. After TracFone ships its handsets to the 60,000 retailers, it has no way of knowing where those phones are being used, nor can it identify how many are primarily being used in high-cost areas.²⁹ Therefore, without wholesale changes to its business model (changes that have not been communicated to the FCC), TracFone cannot make the type of certification that all ETCs must make – that all federal high-cost support "will be used *only* for the provision, maintenance and upgrading of facilities and services for which the support is intended..."³⁰

B. As an ETC, TracFone must offer Lifeline and Link-up discounts; Under its current business model, TracFone cannot.

As is required of all ETCs, TracFone, as an ETC, must offer the low-income programs, Lifeline and Link-Up. As previously noted, TracFone does commit to offer these programs. However, again, without changes to its business model, TracFone customers cannot qualify for either Lifeline or Link-Up.

²⁸ In the Matter of Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, *Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256*, FCC 01-157, CC Docket No. 96-45, CC Docket No. 00-256 (rel. May 23, 2001) para. 183 (RTF Order).

²⁹ See TracFone Petition for ETC Designation, p. 13 ("...the service is available to everyone -- ...*irrespective of residency...*) (emphasis added).

³⁰ 47 U.S.C. §254(e) (emphasis added).

USAC states that for both Lifeline and Link-Up, “[t]he telephone service address must be the participant's primary residence.”³¹ Further, it must be the named subscriber that qualifies to participate in either Lifeline or Link-Up.³² As detailed above, TracFone has no current way of knowing its customers’ primary residence.³³ Without this knowledge, the possibility for abuse of these two valuable programs is great. As TracFone submits no details as to how it will offer these programs to qualifying customers, or even track its customers’ service address, the FCC must deny TracFone’s application for ETC status.

C. Even though TracFone’s application requests ETC status in nine federally-recognized tribal lands areas, it fails to prove important jurisdictional questions.

TracFone requests ETC status throughout New York State.³⁴ The State of New York includes nine tribal land areas recognized by the federal government.³⁵ The FCC has established specific requirements for requesting ETC status on tribal lands,³⁶ yet, TracFone makes no attempt to fulfill these requirements.

In 2000, the FCC determined that “carriers seeking an eligibility designation from this Commission for the provision of service on tribal lands should provide fact-specific support demonstrating that the carrier is not subject to the state commission’s jurisdiction for the

³¹ See <http://www.universalservice.org/li/components/linkup.asp> and <http://www.universalservice.org/li/components/lifeline.asp>.

³² Ibid.

³³ Within its Petition for ETC Designation, TracFone touts the appeal of its service to “transient users.” TracFone Petition for ETC Designation, p. 14.

³⁴ See, in general, TracFone Petition for ETC Designation.

³⁵ The tribal areas include: Allegany Reservation of the Seneca Nation of New York; Cattaraugus Reservation of the Seneca Nation of New York; Cayuga Nation of New York; Oil Springs Reservation of the Seneca Nation of New York; Oneida Nation of New York; Onondaga Reservation of the Onondaga Nation of New York; St. Regis Mohawk Reservation of the St. Regis Band of Mohawk Indians of New York; Tonawanda Reservation of the Tonawanda Band of Seneca Indians of New York; and the Tuscarora Reservation of the Tuscarora Nation of New York. See

http://wireless.fcc.gov/auctions/data/crossreferences/Auctions_2000_1990_TL&TelephonePenetrationRate.xls

³⁶ See, in general, In the Matters of Federal-State Joint Board Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Western Wireless Corporation, Crow Reservation in Montana, Smith Bagley, Inc., Cheyenne River Sioux Tribe Telephone Authority, Western Wireless Corporation, Wyoming, Cellco Partnership d/b/a/ Bell Atlantic Mobile, Inc., Petitions for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Universal Service, *Twelfth Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, FCC 00-208, CC Docket No. 96-45 (rel. June 20, 2000) (Twelfth Report & Order).

provision of service on tribal lands.”³⁷ The FCC emphasized that “this is a strict burden and that generalized assertions regarding the state commission’s lack of jurisdiction will not suffice.”³⁸

TracFone, while it provides a letter from the State of New York Department of Public Service stating that, *as a CMRS carrier*, it is not subject to the jurisdiction of New York,³⁹ provides not even one fact demonstrating that New York has no jurisdiction over it when it provisions services on tribal lands. Actually, TracFone shows no awareness that it is even requesting ETC status in tribal areas or that there are specific requirements for such carriers. Finally, as it does not discuss whether or not it has jurisdiction over tribal lands or any carrier, let alone TracFone, serving tribal lands, the letter from the New York Department of Public Service also is not sufficient to meet TracFone’s burden under Section 214(e)(6) of the Act.

IV. The FCC Should Deny Both Petitions Filed by TracFone.

TracFone has utterly failed in proving why the FCC should now, at a time when the high-cost fund is ever-increasing, forebear and allow pure resellers ETC designation. The FCC’s original premise, first made in 1997, is, in the face of the multitude of CETCs, even more correct now in 2004. Until TracFone can provide even some service over its own facilities, it cannot and should not receive universal service support.

Respectfully submitted,

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³⁷ Twelfth Report & Order, para. 122.

³⁸ Ibid.

³⁹ Attachment 2, TracFone Petition for ETC Designation.